Volume XI.] *June, 1896.* [*Number 2.*

POLITICAL SCIENCE QUARTERLY.

THE PROGRESS OF FEDERAL RAILWAY REGULATION.

THE Interstate Commerce Act, originally regarded even by its friends as a legislative experiment, has remained for nine years without any fundamental or very material modification. This period is unquestionably long enough to permit the formation of an accurate empirical judgment regarding the efficiency of the law and to justify the entire substitution of the practical results of experience for merely theoretical discussion of its merits.

Before entering upon such a discussion it is indispensable to ascertain and precisely define the evils that the law was intended to correct and the remedies it provided. The first three sections, which have been considered merely declaratory of well-recognized principles of the common law, prohibit not only excessive charges for railway service, but also charges so adjusted with reference to other charges as to subject any person, locality or class of traffic to unreasonable or unjust prejudice or disadvantage; while the fourth section adds a rule of evidence in connection with complaints arising under the third, by imposing upon the carrier making a greater charge for a shorter intermediate carriage of persons or property than for a longer one in the same direction, the burden of sustaining the justice of the discrimination by proving the existence of circumstances and conditions substantially dissimilar. The infer-

ence is reasonable and inevitable that the evils which attracted the attention of Congress and against which it intended to legislate were those of excessive and relatively unreasonable or unjustly discriminating charges.

A careful analysis of the act shows that Congress attempted to provide three remedies, each of which separately and independently had been advocated as a satisfactory solution of the problem of railway rates by persons holding the most divergent views. These remedies were: (*a*) a summary process for hearing and adjudicating complaints against railways and for enforcing without delay the measures of relief found necessary; (*b*) the perpetuation of competition; and (*c*) publicity for the details of railway management, operation and finances.

The failure of the first remedy was immediate and complete. The United States courts, to which appeal must be made for decrees enforcing the orders of the Interstate Commerce Commission, promptly declared that the law gave no finality to the acts or conclusions of that body; and in proceedings upon applications by the commission for the enforcement of its orders, defendant railways were permitted to introduce entirely new evidence and to adopt new lines of defense. Obviously this construction of the statute deprives procedure before the commission of any efficacy in simplifying or expediting measures for relief from railway oppression, except in those cases in which the railways see fit to comply voluntarily with its orders.[1] In other words, the investigation of complaints

[1] The following from the latest report of the Interstate Commerce Commission is of interest in this connection: "In the case of The James & Mayer Buggy Company *vs.* The Cincinnati, New Orleans and Texas Pacific Railway Company *et al.* (the Social Circle case), which involves the most vital principles of the act, the commission rendered its decision in 1891, and filed a petition for the enforcement of its order in the United States circuit court for the northern district of Georgia on the 21st of October, 1891. Four years have since elapsed, and this case is pending in the Supreme Court. Numerous cases in the lower courts wait upon the decision of this case, and are continued from time to time to avoid the expense of litigation. In the case of Coxe Bros. & Co. *vs.* The Lehigh Valley Railroad Company, the commission, after a thorough and painstaking investigation, decided that there should be a substantial reduction in the transportation charges on coal from the anthracite region of Pennsylvania to tide-water at New York. On May 21, 1891, the commission filed a petition in the United States circuit court for the

which is provided for by the law, together with the reports, opinions and orders based thereon, have no practical effect other than to give publicity to whatever ground for complaint may be found to exist; and the orders of the commission are only complied with in cases of little importance, or when based upon facts and reasoning so clear, unmistakable and convincing that the railways are unwilling to awaken the public sentiment of condemnation that they feel will be certain to follow non-compliance.

The fifth section of the act attempts to perpetuate competition by making it illegal for any carrier operating over a rail or rail-and-water route to enter into any combination or agreement with other carriers for the pooling of freights or the division of all or any portion of the gross or net earnings from competitive traffic. As no one has ever contended that the suppression of railway competition, which is the sole end and purpose of so-called pooling contracts, tends to produce unjust discriminations between either persons, places or classes of traffic, it may be taken for granted that this section was added because it was believed to be a safeguard against extortionate charges. Though the insertion of this provision is now generally considered to have been a serious mistake, and its operation an almost insurmountable obstacle to the satisfactory enforcement of the fundamental principles of the law, it is not denied that it has been observed with practical uniformity. The occasional evasions which have occurred have required very complicated machinery and have been wholly dependent for their success upon the good faith of the parties; and the service to self-interest from secret violations has been so evident that the periods of their continuance have been too short to have any material effect upon revenues or upon the general condition of railway business.

In the third remedy Congress evidently intended to provide for the broadest and most comprehensive exercise of the visi-

eastern district of Pennsylvania to enforce its order of reduction, and after more than four years the case stands on the docket of the said circuit court untried." — Ninth Annual Report, I. C. C. p. 10.

torial function of government. It authorized and required the Interstate Commerce Commission to inquire, generally, into the business of the carriers subject to its jurisdiction, and to keep itself continually informed as to the manner and methods of conducting their business, and it provided for full investigations and reports concerning all complaints against such carriers. The provision for annual statistical reports, though unfortunately limited by interpretation to a much more restricted class of corporations than its terms would seem to justify, has proved one of the most useful requirements of the statute, and has resulted in the collection of a body of numerical facts relating to the business of railway transportation in the United States that is more accurately and completely descriptive of that business than the statistics that are available in any other country or for any other important industry at home or abroad. Other provisions, intended to assist in securing the same result, authorize the commission to prescribe a uniform system of accounts; require all carriers subject to the act to print, file and conspicuously post copies of their rate schedules, and to file copies of all agreements with other common carriers concerning traffic subject to the act; and give the commission power to issue subpœnas and subpœnas *duces tecum*. Through these requirements the public and its legislative agents have had opportunity to become acquainted with those essentials of railway management that most materially affect the relations between the carrying corporations and their patrons.

These observations indicate the points that an investigation of the results of the Interstate Commerce Law should attempt to elucidate. Non-essentials should not be allowed to lead into relatively unprofitable though alluring by-paths. It is more important to discover whether the evils that the statute was intended to correct still continue — whether there are now frequent instances of excessive charges, or whether particular persons, places or kinds of property now suffer from unjustly discriminating charges, than whether the particular remedies selected have been uniformly observed — whether there have been occasional evasions of the anti-pooling section or instances

of higher charges for shorter than for longer carriage of persons or property such as are forbidden in the fourth section.

What is an excessive charge for railway service? What is the criterion by which a rate can be measured, and the question whether it is in itself just and reasonable correctly answered? It cannot be any definite sum per passenger or per ton of freight per mile; for any standard of this kind either would be so low as almost immediately to reduce all companies to bankruptcy, if applied to all traffic, or would be so high as inevitably and at once to prevent the movement of many commodities of great weight in proportion to their value, the trade in which is now socially necessary and profitable. It cannot be what the service is worth, or, differently stated, the money equivalent of the utility added to the commodity by its transportation from a region of abundance to one of scarcity; because this utility is in itself mainly dependent upon the cost of transportation between the localities, and consequently to adopt it as a standard would be to travel in a vicious and unprofitable circle.

By some it is most plausibly contended that cost of service, since it may not reasonably be exceeded by more than a limited percentage in the price exacted for the service, can, with the addition of a reasonable allowance for return to capital, be made to serve as a standard by which rates may be judged. It might be difficult to combat this contention, were it possible even approximately to determine the cost of any particular service. But this is impossible; for most of the items that make up the total cost of railway service are incurred on the joint account of many shipments, and not in order especially to facilitate the movement of any particular shipment or even any particular portion of the aggregate traffic. The cost of moving a bushel of wheat from Minneapolis to New York *via* Chicago includes, among other things, a portion of the outlay for maintaining yards and terminals at Minneapolis, Chicago and Jersey City; for wages of trackmen along the entire route; for telegraphs and signaling apparatus; for keeping bridges, culverts and trestles in repair; for the fuel and oil consumed by the locomotives employed during the run; for clerical work in the

general offices of each company whose line is traversed; and for taxes paid to the states of Minnesota, Wisconsin, Illinois, Indiana, Ohio, Pennsylvania, New York and New Jersey. It is obviously impossible to assign to any particular shipment a definite proportion of these expenses, and successfully to maintain that neither more nor less than that proportion was incurred solely in order to effect the transportation of that identical shipment. Even the distribution of such items of cost as maintenance of road bed between passenger and freight traffic can be accomplished only in a wholly arbitrary manner. All that is possible on the basis of cost is to determine the aggregate amount necessary to carry on transportation of all kinds over a particular line; and when to this is added a reasonable allowance for return to capital, the total is the maximum which the corporation owning that line may fairly receive as its revenue from operation. A greater revenue is unreasonable and excessive, though in the adjustment of the charges from which it is derived some of them may be too low.

If a railway carried only a single commodity in uniform quantities, and always between the same points in the same direction, it would be possible to determine whether, measured by the cost of service, the rate charged was fair and reasonable; but the moment this condition is disturbed by the acceptance of other traffic, for instance, a return load for the cars already employed, it becomes impossible to consider the justice of the rate continuously enforced on the former traffic without reference to the charges applied to, and the revenue derived from, the new business. For example, take the case of a road one hundred miles in length between the points *A* and *B* engaged solely in carrying lumber from the first to the second of those points, all cars returning empty to *A* for reloading. Suppose the cost of the road to have been $1,000,000 and its capitalization to be the same amount, divided equally between stock and bonds. Now if the operating expenses and taxes are $50,000, and five per cent is a reasonable return to capital, a freight rate fair and reasonable alike to the public and the railway should produce a gross revenue of $100,000. A higher revenue would

indicate an excessive rate, and a lower one would be unjust to the owners of the line. If the total traffic amounted to 50,000 net tons per annum, ten cents per one hundred pounds, or two cents per ton, per mile, would be a reasonable and just rate. If during the continuance of these conditions it became practicable to obtain a return load for the cars employed in moving lumber, — say flour to the amount of 10,000 tons per annum, — no increase would be necessary in many of the items of operating expenses, and but little in any of them. If ten cents per one hundred pounds is a fair rate for moving flour from *B* to *A*, the revenue from the new traffic would amount to $20,000. Estimating the increase in operating expenses incident to the new traffic at $5,000, there would be an increase of $15,000 in the revenue available for return to capital. But as five per cent is a reasonable return, this increased amount, equivalent to six and one-half per cent, must be excessive. Hence the rate on lumber that was formerly fai and reasonable (we have supposed the new rate on flour to be just) is now unreasonably high. As the road may not justly earn more than $50,000 per annum above operating expenses and taxes, the rates on lumber should be reduced to a sum which will produce but $85,000, or to eight and one-half cents per one hundred pounds. Of course in practice no railway operates under the simple conditions described, and the determination of the proper relation between different rates in the carrier's schedule is much more complicated.

The conclusion is evident that, in the present complex condition of the railway industry, all that can properly be predicated of the rate charged for the transportation of any shipment is that it is just or unjust, reasonable or unreasonable, relatively to other rates. A rate is relatively unreasonable when in the general competition it puts any person, place or commodity at a disadvantage that is not based upon a substantial difference in the governing circumstances and conditions. Discussion of the results of the Interstate Commerce Law should, therefore, be confined to the question whether the relative adjustment of railway charges is now generally fair to individuals, commodities and localities.

It will not be necessary to encumber the discussion with an attempt to formulate theoretical rules by which to determine whether any particular rate is relatively just and reasonable. As a matter of fact, many of the discriminations that now exist are so manifestly unjust, so clearly arbitrary, and do so unquestionably subject persons, places and kinds of property to unreasonable prejudice and disadvantage, that their mere citation is conclusive of all controversy.

As has been indicated, rates may be relatively unjust: (*a*) when differences are based upon the individuals for whom service is performed; (*b*) when rates upon different commodities are adjusted for the purpose or with the effect of fostering the movement of one at the expense of the other to an extent greater than is warranted by differences appertaining to the commodities themselves; and (*c*) when differences between rates to or from competing localities are such as unduly to favor the products or industries of a particular town, city or district.

Unjust discriminations between individuals located at the same place are those that are most readily observed by and consequently most obnoxious to the general public, though it is extremely doubtful whether their consequences approximate in gravity the serious and deplorable effects of those that fall within the second and third classes. That it is unjust to charge *A* sixty dollars for the transportation of a carload of wheat from Chicago to New York, while at the same time *B* is charged but fifty-five dollars for the same service, is apparent; and no one can doubt that, if persisted in, the discrimination will eventually destroy *A*'s business. That it would, at the same time, be even more unjust and disastrous to charge *C* seventy-five dollars for moving a carload of flour over the same route, or *D* ninety dollars for taking a carload of wheat from St. Louis to New York, is susceptible of demonstration, but is by no means equally apparent to the superficial observer. Between discriminations of the first class and those of the other two there is a fundamental distinction which affects materially their treatment under the law. Unjust discriminations between individuals can be effected only by means of

secret deviations from the published rate schedules, while those between producers of different commodities or between localities appear on the face of tariffs and classifications. The secret rates, rebates, drawbacks, allowances or other illegal devices resorted to in order to accomplish the first kind of discrimination are punishable by fine or imprisonment; the only remedies for the other kinds are modification of the rate schedules or classifications and monetary recompense for the damage suffered.

Prior to the enactment of the Interstate Commerce Law so common was the practice of granting special rates to particular shippers that instances in which full published rates were charged have been declared by a high authority[1] to have been the exception rather than the rule. Where the traffic was of great importance and the competition between rival roads exceptionally strenuous, each railway has been known to select a particular shipper with whom arrangements for reciprocal favors were made. By means of such an arrangement a single firm was able practically to control for a considerable period all shipments of corn over a great trunk railway and to one of the principal ports from which that cereal is forwarded to foreign countries. The number of discriminations of this kind is known to have been materially reduced in consequence of the operation of the Interstate Commerce Law. They continue, however, to be one of the most effective weapons in competition for traffic between particular points, and will be an important factor in the railway situation as long as competition is a controlling element in rate-making. It is not even certain that they are not more harmful now than when more common; and it may be found that their baneful effects are accentuated by the fact that instead of being made, as formerly, for nearly every applicant, concessions from established rates are now granted only to powerful traders who are able to control vast shipments, and to traffic that yields a revenue that is of almost vital importance to the carrying companies. That

[1] Mr. C. C. McCain, in his report to the committee on finance, of the United States Senate. See Senate Report No. 1394, Fifty-second Congress, second session, Part I, p. 433.

such discriminations were a principal factor in the development of the petroleum monopoly, is generally understood. How far other great monopolies, such as those controlling beef and pork products and the sugar supply, have been so favored, is problematic, though their ability successfully to demand such aid is undoubted.

Unjust discriminations prejudicial to particular commodities have not been greatly diminished by the operation of the Interstate Commerce Law. They are announced boldly in freight classifications and rate schedules, and the burden of proof is generally upon those who allege that they are unjust. Numerous cases of this kind have been heard and decided by the Interstate Commerce Commission; and in a few instances in which the commission has directed the modification of the obnoxious charges and the promulgation of others relatively reasonable, substantial compliance upon the part of carriers has ensued. A case decided by the commission during 1891 affords an example of a discrimination of this kind which might, if continued, have destroyed an important industry in one of our chief cities.[1] The rate on live hogs from Chicago to Boston previous to June, 1887, was about forty-six per cent of the rate on dressed hogs slaughtered at the former city. Under these rates both commodities moved in considerable quantities, and the business of killing and dressing pork was profitably conducted in both cities. During 1887 and 1888 this situation was disturbed by successive changes in the rates on dressed hogs, without corresponding alterations in those on the live animals, and from July 14 to August 19, 1888, the cost of moving the latter stood at 135 per cent of the charge for the former. The inevitable effect upon the business of slaughtering at Boston is sufficiently obvious. The Interstate Commerce Commission, in response to complaints brought before it, has found it necessary to prescribe the proper relations between rates on such pairs of commodities as the following: common soap and pearline, dried fruits and raisins, lumber and hub blocks, lumber and railroad ties, wheat and flour, corn and

[1] Squire & Co. *vs.* Michigan Central Railroad, Fourth I. C. C. Report, p. 611.

its products, grain and grain products, celery and green vegetables, window shades and hollands, petroleum oil and its products. The paramount difficulty involved in any attempt upon the part of public authorities to deal with this kind of discrimination is that the cases arise almost invariably from the classification of freight, which is itself a matter of agreement between all of the railways operating in a large territory. Complaints are made, however, in regard to specific rates resulting from such classification and against those lines only over which a shipment at the obnoxious rate would pass. It is seldom practicable to cause all those interested in the classification to appear as parties defendant; yet unless this is done, their voluntary compliance with the final order is all that can make it effective. As a direct and by no means unnatural consequence of this fact, many most serious discriminations of this class are never brought to public attention and remain unremedied.

The most important, far-reaching and deplorable results spring from that class of unjust discriminations which have for their victims not merely individuals residing at the same place or producing different but competing commodities, but the entire population of towns, cities and even extensive districts, which are made to suffer unfair disadvantage from the relative adjustment of railway charges. Practically the whole region south of the Potomac and Ohio, and east of the Mississippi, has continuously suffered from discriminations of this kind, through the system of making charges to a few selected cities the basis for through rates to all other points. Through rates are made to and from about two hundred of the larger towns, including Atlanta, Birmingham, Chattanooga, Meridian, Vicksburg, New Orleans and Mobile, and traffic shipped from or to all other points is charged the rate to one of these basing points plus the local rate from such basing point to final destination. In practice it is common to make the combination by the use of rates to and beyond whatever basing point will show the lowest total, whether on the line traversed by the shipment or not. Thus a shipment from Cincinnati to a point on the line from that city to New Orleans,

and located near the latter, would be charged the rate to New Orleans plus that from New Orleans to the local point. The efforts and influence of the Interstate Commerce Commission have secured a substantial reduction of these discriminations against the smaller towns of the South, and along the main lines of the more important roads some of the grosser disparities resulting from this system of rate-making have been abolished ; yet the system is still in full force over most lines.

The condemnation of such a system cannot be too severe.[1] It not only limits the commercial activities of the towns unjustly discriminated against and restricts the sources from which they can draw supplies, but by hindering their growth it retards the development of the entire section in which such discriminations are common. This reflex influence includes in its baneful con-

[1] The following reference to a case involving this system of rate-making is from the Ninth Annual Report of the Interstate Commerce Commission, p. 29. "The complainants, Hill & Bro., do a wholesale grain, flour and hay business at Cordele, Ga. (not a basing point), in competition with dealers at the cities of Albany, Americus and Macon, which are basing points and therefore enjoy rates lower than those to Cordele from common sources of supply. The Commission said in this case: 'If, as defendants claim, competitive conditions, existing among themselves and other members of the Southern Railway and Steamship Association, authorize them to select basing points and distributing centers and to give them lower or preferential rates, upon what ground are Macon, Americus and Albany so favored while this advantage is denied to Cordele? It can be and is reached from Nashville over various competing lines, formed in connection with two initial and two terminal lines; it has convenient rail communication east, west, north and south; it is less distant by rail from the coast than Americus, Macon and Albany, and is arbitrarily excluded from the advantages given to its rivals and business competitors. The general freight and passenger agent of one of the defendant companies, a witness called by them in support of the higher rates to Cordele, testified that Macon, Americus and Albany were competitive points and Cordele was not, for the reason that it is not a distributing point to the extent that the other places are; that if competitive forces were allowed to operate at Cordele so as to give it lower rates, its business would increase to some extent and thus make it more of a distributing point. Testimony for complainants is that the increase of business to result from reduced rates would be large. We have, then, this state of case. Cordele is not treated by the defendant roads as a competitive point because it is not a sufficiently large distributing point, and it is not such a distributing point because it is not treated as a competitive point, and the defendants seek to excuse themselves from wrong-doing by offering the results of the wrong in justification. Tried by its results, this system of rate-making is at variance with all the equality provisions of the act to regulate commerce, including that which requires all rates to be reasonable and just.' "

sequences the very cities that are supposed to be favored, and by dwarfing the prosperity of the territory contiguous to their lines depletes the revenues of the railways themselves. Rates to New York City from all cities and towns in the southern peninsula of Michigan, in Illinois, Indiana, Ohio and the portions of New York and Pennsylvania west of Buffalo and Pittsburg are certain fixed percentages of those from Chicago. Thus the rate on any given commodity from Cincinnati to New York is eighty-seven per cent of what it would be if the shipment originated at Chicago; from Detroit, seventy-eight per cent; from Cleveland, seventy-one per cent; from Indianapolis, ninety-three per cent; and from East St. Louis, one hundred and sixteen per cent. Rates to Boston are higher and to Baltimore and Philadelphia lower, by certain arbitrary amounts varying according to the different classes, than those to New York from the same points. The percentage of the Chicago-New York rate to be applied from each competitive point is fixed by agreement between the roads concerned, while each road is left at liberty to adjust to its own satisfaction the charges from and to points strictly local to its own line. Naturally the course commonly adopted since the fourth section of the Interstate Commerce Law has prohibited higher charges for intermediate hauls has been to make rates from local points the same as from the nearest competitive point on the through line on which they are situated. It thus frequently happens that a competitive-point rate will apply from local points which are very much nearer the common destination.

Whether such an arrangement can in any case constitute an unjust discrimination, and whether a rate that is fair and reasonable for a distance of, say, 800 miles is not clearly excessive for one of 750 miles in the same direction over the same line, is a delicate inquiry that it will fortunately be unnecessary to undertake in this connection. But it is desirable to point out a result of this system which is due to the fact that frequently a north and south line will have two or more connections over which traffic between its local stations and the seaboard may be carried. Whenever this condition exists,

it is clear that traffic between the seaboard and any one of the points of junction with such connections may be carried *through* any other of those points. Not infrequently each of such junction-points has been accorded a different relation to the basic rates, and in such cases the transportation of freight through the point having the higher percentage to or from the point having the lower results in a violation of the general rule laid down in the fourth section of the Interstate Commerce Law. It has been intimated that this is not necessarily conclusive evidence of an unjust discrimination; but where there is competition neither from carriers operating over water routes nor from foreign railways not subject to the restraints of the law, — where, in fact, the dissimilar conditions are created by the railway system (though not by any particular railway), the rule of evidence prescribed in the long-and-short-haul clause is satisfactory and conclusive. It may not be at present either possible or advisable to correct in all cases the discriminations so made; and *under existing conditions* there may be rare and peculiar instances in which lower rates to more distant than to intermediate points are justified, so far as the line actually making them is concerned, by the competition of railways subject to the act; but the circumstance is none the less unfortunate and harmful, and the aim of railway regulation must not be allowed to fall short of a complete remedy.

The manner in which competition at points served by two or more railways affects those having but one has received general recognition, and is one of the most powerful causes of the too rapid construction of railways that has burdened the country with many unnecessary, unprofitable and bankrupt lines. To attempt to regulate these cases by the process of taking them up singly and prescribing the alterations necessary in order to make the charges relatively reasonable, is a task scarcely less impracticable and hopeless than that of emptying the Atlantic with a teaspoon. Though the relief afforded to particular places through the orders of the Interstate Commerce Commission has often been of great local importance, a large number of its decrees, including those most important, have

been entirely ignored or are now awaiting enforcement through the tedious processes of the courts. Even had the commission itself the authority of a United States court, and were there no appeal from its decisions, the town with two railways would still have an immense advantage over that with one. In the case of the Eau Claire Board of Trade,[1] decided by the commission during 1892, it was contended by the complainants that the rates charged on lumber shipped from Eau Claire, Wisconsin, to points on the Missouri River were so high relatively to those on shipments from points competing for the business of supplying the same markets, as practically to destroy the business of Eau Claire. Only a few of the roads serving these competing points reached Eau Claire, and according to the view of the law adopted by the commission roads operating from competing sources of supply could not be said to discriminate against a point from which they did not and could not carry traffic. The only action available in order to remedy the injustice under which it was found that Eau Claire was suffering was to order a reduction from that point, and in announcing its conclusion the commission said :

> Undoubtedly those roads [referring to those not reaching Eau Claire and consequently not included in the order] have it in their power to continue the present disparity, but we do not anticipate, and certainly cannot assume, that they will resort to such inconsiderate and arbitrary action in order to nullify the lawful order of this commission.

The compliance of the defendant railway with the order of the commission was, however, almost immediately nullified by the action upon the part of the other railways which that body had most properly refused to anticipate, and the rates of all lines were ultimately restored to practically the figures in effect previous to the decision.

The conditions described are fairly typical of those existing all over the United States. The Interstate Commerce Law has mitigated but slightly, if at all, the evil of unjust discriminations between individuals ; has in but few instances moderated to any

[1] Fifth I. C. C. Report, p. 264.

important extent the relative injustice in the charges exacted for moving competing commodities; and has almost utterly failed to remedy the far more serious inequities in rate-making which operate to the disadvantage of towns, cities or districts. The practical acquiescence of the Interstate Commerce Commission in this conclusion may reasonably be inferred from the following extract from its latest annual report:

> It is believed, as was further indicated in our last report, that the discussion of the principles and aims of the statute may well give place, temporarily, to a consideration of the means necessary to make effective and give force to the law in accordance with the purpose of its enactment. The experience and observations of the past year, in which the progress of regulation has not been entirely satisfactory, warrant the conclusion that with the official proceedings and transactions of the year relating to the operations of the law we should report as a matter of first importance and recommend the additional legislation deemed indispensable to give effect to the act in accordance with its purpose, as declared in the first three sections thereof. . . . The importance of amending the present law cannot be stated with too much emphasis. . . . It certainly cannot be believed that Congress, having once assumed to exercise a measure of control over railway carriers, will allow that control to become ineffectual by withholding the legislation found necessary to secure the results expected.[1]

The report proceeds to enumerate the particulars in which, in the opinion of the commission, the statute is chiefly defective, and to suggest remedial legislation. The purpose of the amendments recommended is declared to be merely to "give to the statute the degree of completeness and effectiveness which it was designed to have, and to provide the means whereby its purposes can be fairly accomplished"; and this statement seems fully supported by an examination of the amendments themselves. They are mostly intended to obviate the difficulties now encountered in efforts to secure testimony regarding violations of the law, and to give a satisfactory degree of finality to the proceedings before the commission.

If all that is necessary in order to secure thorough and satisfactory supervision of railway transportation is to reinforce the

[1] Ninth Annual Report, pp. 5–11.

law by adopting the amendments suggested by the commission or by otherwise perfecting the remedies already provided, the situation is comparatively simple, and adequate and early relief may reasonably be anticipated. That the commission itself does not take such a superficial and complacent view, is apparent from the careful qualifications with which its proposed amendments are submitted.[1] The modifications recommended relate solely to the enforcement of the remedies already provided, and the language used by no means amounts to an expression of confidence that those remedies, even if applied with the utmost rigor, would prove effectual. It is much to be doubted whether any member of the commission or any other careful observer believes that they would. The inadequacy of these remedies is evident as soon as the real cause of the evils is understood. No writer making use of the English language has more clearly and concisely stated the conditions governing the business of railway transportation than the Hon. Thomas M. Cooley, formerly chairman of the Interstate Commerce Commission; and nowhere has the exact nature of the real railway problem been so happily and accurately expressed as in his opening address to the third annual convention of railroad commissioners. Among other things, he said :

When the number of railroads which are now merely subsidiary to other and stronger lines, either through being brought into the same interest or from being leased or otherwise effectually controlled, are left out of account, there are something like five hundred in this country still remaining whose boards have the power to make rates for the carriage of passengers and property. These boards are by the law left to exercise in the first instance what is practically a free and unlimited authority in the making of rate sheets. They may make them high or low, just or unreasonably discriminating as between persons and property, or different classes of property, or between different centers of trade, at pleasure. . . . It was at first thought by

[1] "Those who have given most reflection to the subject of government regulation are aware that the laws now in force are more or less tentative and experimental, and such persons anticipate that the evolution of railway control by public agencies will sooner or later result in a more comprehensive and direct exercise of the power possessed by Congress to regulate our internal commerce."— Ninth Annual Report, Interstate Commerce Commission, p. 11.

those who made the laws for the building and management of roads that to leave the authority thus unrestricted was the best possible condition of things, that it would lead to active competition in rates, of which the general public would have the benefit; that the competition would as a matter of course force the rates down to a reasonable point; in short, that the competition would act precisely as it does in other lines of business. Experience has shown that this idea of railroad competition is a mistaken one, that it cannot be compared with competition in the channels of commerce in general, that there are no such tests of the value of railroad service as can fix the limit down to which a road may go without inevitable loss upon its business as an aggregate, that it may carry some classes of its business at impolitic if not in fact at losing rates, and yet make profits upon its whole operations by charging to other classes of its business rates which may perhaps seem excessive and yet cannot clearly be shown to be so because of the absolute impossibility of making distinct apportionment between the cost of service rendered to one class and that rendered to the other. . . . But so inextricably are the railroads of the country intermingled in interest, in so many ways do they form routes from business center to business center, from the Lakes to the Gulf and from ocean to ocean, so easy is it for almost any seemingly unimportant road to be made a part of some direct or indirect route which shall constitute a great channel of commerce, that any considerable change in the rate sheets by any one of these five hundred boards is not only likely to affect the business and the rate sheets of the roads which are its immediate rivals, but to reach out also in its influence from road to road in all directions, not over small neighborhoods, but from state to state, until what seemed to be the action, and was perhaps the hasty and reckless action, of a mere local board may become almost of continental importance. . . . This then is the railroad problem. There are mischiefs in railroad service that are outside of it, but we distinctly indicate the main source of difficulty when we place our finger upon the power as it exists now to make and unmake the rates for passenger and freight transportation.

It would be difficult indeed to formulate a more forcible statement of the fact that in the real and imaginary conflict of interests between the various corporate units that make up the American railway system lies the prime obstacle to successful regulation, and that so long as this conflict continues, the evil of unjustly discriminating rates will be its constant accompaniment.

The unreasonable rate not made either to secure competitive traffic or to recoup losses from carrying such traffic at too low rates is so extremely rare that its very existence may well be doubted. Unjust discriminations between individuals are resorted to in order to secure by means of secret rates, rebates or other devices a greater proportion of the traffic from or to competitive points than would be carried at open and equal rates. Discriminations between commodities result most frequently from favoring articles produced by heavy shippers or in towns at which competition is sharp, or from the fact that the railways agreeing to a particular classification have not a sufficient identity of interest to make naturally for harmony and justice. Localities either are favored unduly because they are served by competing lines, or are discriminated against in order that low rates may be maintained at other points more fortunate in this respect. The charges to local points on main and branch lines are too high relatively to those at terminals where there is competition; yet it cannot be denied that so long as the carriers are independent of each other in the matter of revenue there will be many plausible arguments available for the defense of these relations. The difficulty of dealing with such discriminations is greatly enhanced by the insufficient information upon which it is necessary to decide regarding the reasonableness of rates under present conditions. Thus in determining whether a given rate on wheat from Chicago to New York is reasonable and just it may be necessary to consider the rates on the same article to Buffalo, New York, Philadelphia, Baltimore, Boston, Montreal, Newport News and other eastern points not only from Chicago, but also from Minneapolis, Duluth, East St. Louis, Peoria, Cincinnati, Buffalo and other places. Rates on flour, corn and corn meal between any of those points may also be involved; and possibly the charges on any of the commodities named from St. Paul or St. Louis to New Orleans *via* the Mississippi River boats, and from New Orleans to New York or Liverpool by steamer, may in some way be connected with the controversy so as materially to affect its decision. In fact it is impos-

sible to set any limit to the data that may have an important bearing upon the question at issue, or to say of any fact concerning commerce or transportation that it would necessarily be wholly irrelevant in such a controversy; yet the parties defendant, when such a case is heard before the Interstate Commerce Commission or the courts of the United States, are only the carriers between Chicago and New York. When the interdependence of all rates is thoroughly understood and the extent and importance of this condition fully appreciated, it will be a matter of little surprise that, through the absence of sufficiently comprehensive information in particular cases and through the impracticability of treating the subject of railway rates under the present system in the broad and thorough manner absolutely essential to the correction of the evils now existing, even the clear-headed and able men who have constituted the Interstate Commerce Commission have been led into occasional errors, which have furnished arguments to those who from self-interest desire a return to the system in vogue when there was no public supervision of interstate commerce by rail.

The conflict of interest between the different corporate units of the railway system is the primary cause of the evils attendant upon railway transportation as now conducted. This fact being clearly established, it is at once evident that that portion of the Interstate Commerce Law which was intended to perpetuate competition, *i.e.*, the fifth or anti-pooling section, is radically antagonistic to any wise and practicable system of railway regulation. It is necessary at the outset, as a first step toward a system under which railway rates can be made equal to all, that this restraint upon the carriers should be removed — not in order to save them from the bankruptcy that is almost certain to follow the vicious methods now in vogue; not for the sake of the thousands whose small savings have been invested in railway securities in the reasonable belief that Congress would not legislate so as to destroy an investment through which private capital is made to perform a public function: but in order to relieve individuals, classes of property and localities from the unjustly discriminating charges for railway service from

which they now suffer. At the same time Congress should give some substantial finality to the findings of the board of railway experts which, under the name of the Interstate Commerce Commission, it has created to adjudicate between the railways and their patrons, and should strengthen the visitorial functions of that body by granting whatever amendments to the law are necessary in order to secure the production of all the legal testimony desired, and by considerably widening the scope of its statistical investigations.

But this is only a beginning of progress toward more enlightened methods of dealing with this important industry. It has never been found profitable to legislate in restraint of natural economic forces ; but the best results have accrued when statesmen have frankly recognized the tendency of those forces and have sought to make their operation useful to society. The force which tends toward the consolidation of railway properties is one of the most powerful, and it is now recognized that such consolidation is in the public interest. All provisions forbidding or hindering the various forms of consolidation of parallel or connecting railways, whether contained in state constitutions or in federal or state statutes, should be repealed, and public and legislative encouragement, so far as practicable, should be generously accorded to every step that tends toward the complete harmonization of the railway system. If this somewhat radical change in the attitude toward the railway monopoly can be effected, it will not be long before favoritism will become as rare in railway rates as in the rates of taxation.

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[NOTE. — On March 30 of this year the Supreme Court at last handed down a decision in the case of Buggy Co. *vs.* Railway, referred to in the note on page 202. — EDS.]